Supreme Court, U.S.
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No. 98-

IN THE

Supreme Court of the United States

JUDY BAKER; MYRA ALLISON; BONNIE JOHNSON,
Petitioners,

v.

PATRICIA HADLEY,
COLUMBIANA COUNTY AUDITOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether job duties "envisioned" by a newly elected public official for existing public employees' jobs deprive those employees of the First Amendment protection from political discharge recognized by *Elrod v. Burns*, 427 U.S. 347 (1976), and provide the public official with immunity, especially where the employees' jobs have not been jobs for which politics is a legitimate requirement and the "envisioned" job duties are used as a pretext for termination.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

CITATION OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 7

A. Basis of Jurisdiction in the Lower Courts 7

B. Statement of Facts 9

REASONS FOR GRANTING THE WRIT 10

CONCLUSION 14

APPENDIX A-1

TABLE OF AUTHORITIES

Page

Cases:

Baker v. Hadley, 167 F.3d 1014 (1999) 1, 8, 10

Branti v. Finkel, 445 U.S. 507 (1980) 10

Elrod v. Burns, 427 U.S. 347 (1976) 10

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) 10

Statutes:

28 U.S.C. §1254 1
28 U.S.C. §1291 8
28 U.S.C. §1331 7
28 U.S.C. §1343 7
42 U.S.C. §1983 . . . . . 3, 7
42 U.S.C. §1985 . . . . . 3, 7
42 U.S.C. §1988 . . . . . 6, 7

Constitution:

First Amendment of the United States Constitution 2, 7, 12

Fifth Amendment of the United States Constitution 2, 7

Fourteenth Amendment to the United States Constitution 2, 7

CITATION OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS

The opinion of the Court of Appeals for the Sixth Circuit is reported at 167 F.3d 1014 (1999). The opinion is reprinted in the appendix hereto, p. A-1.

The decision of the United States District Court for the Northern District of Ohio (Gaughan, J.) is unreported. The opinion is reprinted in the appendix hereto, p. B-1.

The opinion of the Court of Appeals for the Sixth Circuit in the initial appeal in this case, *Baker v. Hadley*, 72 F.3d 129 (6th Cir. 1995) (unpublished per curiam), *cert. denied*, 116 S. Ct. 1876 (1996), is unreported. The opinion is reprinted in the appendix hereto, p. C-1.

The initial decision of the United States District Court for the Northern District of Ohio (Wells, J.) is unreported. The opinion is reprinted in the appendix hereto, p. D-1.

JURISDICTION

On February 12, 1999, the Sixth Circuit Court of Appeals entered judgment in the instant action. The Supreme Court has jurisdiction to review this decision under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution:

> Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or en-

force any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1985:

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States,

or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. §1988:

Sec. 1988. Proceedings in vindication of civil rights

(a) The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. 1681 et seq.), the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.), title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), or section 13981 of this title,, [1] the court, in its discretion, may allow the prevailing

party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

STATEMENT OF THE CASE

A. Basis of Jurisdiction in the Lower Courts

Plaintiffs filed a Complaint in the United States District Court for the Northern District of Ohio, Eastern Division, which was assigned case number 4:92 CV 0495, alleging violations of 42 U.S.C. §§1983, 1985 and 1988. The District Court had jurisdiction pursuant to 28 U.S.C. §§1331 and 1343, as well as the First, Fifth and Fourteenth Amendment of the United States Constitution. The complaint also raised a pendant state law claim.

On December 6, 1994, the District Court denied Auditor Hadley's first motion for summary judgment on the qualified immunity issue (the claim against her in her individual capacity). The District Court also denied summary judgment on Counts I (which alleged improper political discharge) and III (a pendent state wrongful discharge claim) and granted

summary judgment on Count II (which alleged improper discharge due to Union activity).

The Auditor filed an interlocutory appeal on the qualified immunity issue. The Sixth Circuit Court of Appeals reversed the lower Court and remanded the case for further determination of the qualified immunity issue. *Baker v. Hadley*, 72 F.3d 129 (6th Cir. 1995) (unpublished per curiam), *cert. denied*, 116 S. Ct. 1876 (1996).

On remand the case was transferred to the docket of a newly appointed judge. Defendant filed a new motion for summary judgment relating to the entire case with the District Court. The Auditor attached to the new motion for summary judgment new affidavits and, for the first time, claimed that the firing was due to "restructuring."

The District Court, even though summary judgment had been previously denied on Counts I and III, and the only issue the Sixth Circuit had ordered it to consider was the qualified immunity issue, proceeded to grant summary judgment with respect to the entire case.

Plaintiffs appealed to the Sixth Circuit Court of Appeals which had jurisdiction under 28 U.S.C. §1291. The District Court's grant of summary judgment was filed on September 22, 1997, and the Plaintiffs' Notice of Appeal was timely filed on October 21, 1997. The appeal was from a final decision disposing of all claims. The Sixth Circuit Court of Appeals affirmed the District Court's grant of Summary Judgment.

B. Statement of Facts

On March 11, 1991, her first day in office, Columbiana County Auditor Patricia Hadley fired Plaintiffs Judy Baker, Bonnie Johnson and Myra Allison.

The Deposition of Auditor Hadley took place on November 17, 1992. At that time, when asked her reasons for discharging the Plaintiffs in this case, Auditor Hadley did not even mention "restructuring" the Auditor's office. Instead, she testified that she fired Plaintiffs because she did not believe they could be "loyal" and she intended to have all her employees be loyal employees.

Republican Auditor Hadley's doubts about Plaintiffs' "loyalty" was based on Plaintiffs' working for Auditor Hadley's Democratic predecessors.

The issue in this case, whether Defendant Hadley acted properly in firing Plaintiffs for political reasons, depends on whether Plaintiffs' jobs are those for which politics is a legitimate requirement. The structure of the Columbiana County Auditor's office and the nature of Plaintiffs' job duties demonstrate that Plaintiff's jobs are not those for which politics could be a legitimate job requirement.

Auditor Bell, the Auditor Ms. Hadley replaced, had kept all authority in the Auditor's office to himself. Auditor Bell delegated no authority to his employees to speak or act for him and no employees were entitled or authorized to make decisions for him. All employees in the office reported directly to Auditor Bell who made all the decisions.

At the time they were fired, Plaintiffs had the following job descriptions: Ms. Allison, "Budgetary Financial Specialist"; Ms. Johnson, "Settlements/Abstracts/Tax Rate Operator Specialist"; and Ms. Baker, "Estate Tax/Estate Inventory/Licenses Clerk."

The nature of Plaintiffs' job duties was established in an appeal from the State Personnel Board of Review. In that appeal, the Franklin County Court of Appeals found

> the job duties actually performed by appellants do not establish that they acted for or in the place of the auditor. The record did not demonstrate that any of the appellants had the authority to speak for, act for, or make decisions for the auditor. Appellants did not have policy-making authority.

Baker v. Hadley, Franklin Co. App. No. 94APE10-1550, 94APE10-1551, 94APE10-1552, (6/6/95) (unreported and attached as Appendix F), at p. F-12, F-13, discretionary appeal not allowed, 74 Ohio St.3d 1422 (1995).

REASONS FOR GRANTING THE WRIT

The Sixth Circuit held that "we need not concern ourselves with Plaintiffs' particular job responsibilities" because the Auditor "envisioned these positions to be confidential, policymaking jobs for which political affiliation was an appropriate requirement." *Baker* at 1019.

Under the Sixth Circuit's test, the protection this Court has given to public employees in *Elrod v. Burns*, 427 U.S. 347 (1976), *Branti v. Finkel*, 445 U.S. 507 (1980), and *Rutan*

v. Republican Party of Illinois, 497 U.S. 62 (1990) is rendered meaningless.

Under the Sixth Circuit's test, any public employee can be fired regardless of whether or not their jobs are ones for which politics would be a legitimate job requirement. All a public employer would have to do would be "envision" a job that required politics.

The Sixth Circuit's test ignores the reality of the job duties required by a public employee's job. The actual job duties the individuals were performing must be considered as a vital aspect in determining whether or not a new office holder can legitimately envision new job duties which are political in nature, or is claiming restructuring as a pretext to justify political terminations of public employees.

In the present case, the job duties performed by Plaintiffs were not political in nature. Nor was there any basis for legitimately envisioning political job duties for Plaintiffs whose jobs, at the time they were fired, were: 1) "Budgetary Financial Specialist" [Ms. Allison]; 2) "Settlements/Abstracts/Tax Rate Operator Specialist" [Ms. Johnson]; and 3) "Estate Tax/ Estate Inventory/Licenses Clerk." [Ms. Baker.]

Is it reasonable to envision jobs such as the new jobs which the Auditor claims support her decision for individuals holding the jobs held by Plaintiffs?

Another factor which the Sixth Circuit's decision fails to consider is that it is impossible for a Plaintiff to directly contradict an office-holder's claim that a restructuring is the reason for termination.

The only way for a Plaintiff to contradict a claimed justification of restructuring in a situation such as the present one is through inferences about the validity of the claimed justification, as well as the reasonableness of such claimed restructuring, which inferences may only be drawn by the jury from the facts.[1]

An office holder will always claim restructuring as the basis for justifying political terminations -- especially under the Sixth Circuit's test in the present case, relying solely on the alleged intent of the new office holder.

As a result, under the Sixth Circuit's test, *Elrod* and its progeny are rendered meaningless.

The First Amendment protection is lost when an Officeholder can receive absolute protection and immunity by claiming that "restructuring" or newly "envisioned" job duties justify political terminations when the job duties previously performed had no legitimate political requirement.

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[1] In the present case, for example, the inferences that Auditor Hadley's claim of restructuring are not valid can be made from (1) her actions in firing Plaintiffs immediately on taking office, without intent to eliminate a position at that time; (2) the fact that the jobs actually performed by Plaintiffs do not mesh with the claimed new jobs, so that it would not be reasonable to expect them to perform such jobs; (3) her statements at her deposition that concerns over loyalty were the reason for her decision to fire Plaintiffs; and (4) the fact that restructuring was never raised as a justification at her deposition when she was asked why she decided to fire Plaintiffs.

Additionally, this case involves the issue of what standard applies to a determination of qualified immunity when an office-holder fires public employees. The District Court granted qualified immunity based on the new job duties allegedly "envisioned" by the auditor. The District Court indicated that because those job duties were political, the Auditor was entitled to qualified immunity. [Dist. Ct. op. at B-19.]

Permitting job duties allegedly "envisioned" by an office-holder to establish qualified immunity is an invalid standard for the reasons discussed above.

Additionally, permitting an office-holder to establish qualified immunity through job duties allegedly "envisioned" would effectively convert the concept of "qualified immunity" to one of "absolute immunity." Any office holder would be entitled to qualified immunity through a claim that they "envisioned" political job duties.

The actual job duties of a fired public employee must be relevant to the determination of whether or not such employees can be fired for political reasons, as well as to the determination of whether or not an office-holder is entitled to qualified immunity.

If the actual job duties are not considered, [1] there is no meaning to *Elrod* and its progeny because any employee could have their job designated as a "political" one based on what an office-holder "envisions"; and [2] any office-holder would be able to establish "qualified immunity", improperly converting "qualified immunity" into "absolute immunity."

There must be a legitimate basis for the office holder to restructure an individual's job into one for which politics is a legitimate requirement. If the actual job duties of the Plaintiffs are not considered, there is no way to make such a determination, and all employees are subject to arbitrary political discharge.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JUDY BAKER; MYRA ALLISON; BONNIE JOHNSON, *Plaintiffs-Appellants,*	)	
v.	)	No. 97-4229
PATRICIA HADLEY, Columbiana County Auditor, *Defendant-Appellee.*	)	

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 92-00495—Patricia A. Gaughan, District Judge.

Argued: December 9, 1998

Decided and Filed: February 12, 1999

Before: SUHRHEINRICH, CLAY,
and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Stewart R. Jaffy, STEWART, JAFFY & ASSOCIATES CO., L.P.A., Columbus, Ohio, for Appellants. W. Andrew Hoffman, III, FRIEDMAN & HOFFMAN, Cleveland, Ohio, for Appellee.

ON BRIEF: Stewart R. Jaffy, Marc J. Jaffy, STEWART, JAFFY & ASSOCIATES CO., L.P.A., Columbus, Ohio, for Appellants. W. Andrew Hoffman, III, FRIEDMAN & HOFFMAN, Cleveland, Ohio, John K. Alberty, Columbus, Ohio, for Appellee. Merl H. Wayman, Columbus, Ohio, Jeffrey R. Gordon, Cheri B. Hass, DOWNES & HURST, Columbus, Ohio, for Amici Curiae.

OPINION

CLAY, Circuit Judge. Plaintiffs Judy Baker, Myra Allison, and Bonnie Johnson brought this civil rights action under 42 U.S.C. §§ 1983, 1985, 1986 and 1988, and Ohio state law, alleging that they were improperly discharged for political reasons from their jobs in the Columbiana County (Ohio) auditor's office. The district court granted summary judgment in favor of the defendant, county auditor Patricia Hadley, upon finding that Plaintiffs' positions within the auditor's office were not afforded First Amendment protection against political dismissal. Plaintiffs now appeal. For the reasons set forth below, we AFFIRM the district court's dismissal of the suit on summary judgment.

I.

A. *Procedural History*

On March 9, 1992, Plaintiffs filed an action pursuant to 42 U.S.C. §§ 1983, 1985, 1986 and 1988, alleging that Hadley had improperly terminated them from public employment at the Columbiana County auditor's office in violation of their rights under the First Amendment and state law. The complaint alleged improper discharge due to political affiliation, in violation of the First Amendment (Count I); improper discharge due to Plaintiffs' attempts to unionize the auditor's office, also in violation of the First Amendment (Count II); and wrongful discharge in violation of state law (Count III).

Following extensive discovery, Hadley filed her first motion for summary judgment. Among other things, Hadley argued that she was entitled to qualified immunity in her individual capacity as to Count I of the complaint. Although Hadley denied that she terminated Plaintiffs for political reasons, she contended that it was appropriate for her to terminate Plaintiffs because they were political patronage employees who held confidential and policy-making positions in the auditor's office.

On December 6, 1994, the district court denied Hadley's motion for summary judgment on Counts I and III, but granted Hadley's motion for summary judgment on Count II. In denying Hadley's motion for summary judgment on Count I, the court found that material issues of fact regarding Plaintiffs' duties at the auditor's office prohibited summary disposi-

tion of the qualified immunity issue. The district court held that the factual dispute over Plaintiffs' actual job duties and responsibilities prevented the court from deciding whether Plaintiffs' positions were subject to patronage dismissal.

Hadley then filed an interlocutory appeal from the district court's denial of her motion on grounds of qualified immunity. On December 5, 1995, this Court reversed and remanded. *See Baker v. Hadley*, 1995 WL 717029 (6th Cir. 1995) (unpublished per curiam), *cert. denied*, 517 U.S. 1233 (1996). We held that the district court had misapplied the law by focusing on the duties previously performed by Plaintiffs:

> [W]hen determining whether political considerations are appropriate in making personnel decisions for a certain position, a district court should not look to the duties previously performed by the plaintiff. Instead, the court must examine the inherent duties of that position and the duties that the new hiring authority, *i.e.*, Hadley, reasonably envisions the holder will perform.

Id. at *4 (*citing Faughender v. City of North Olmsted*, 927 F.2d 909 (6th Cir. 1991). This Court stated that the record did "not contain any evidence of what duties Hadley envisioned that the holder of plaintiffs' position would perform." *Id.* Therefore, we reversed the lower court's denial of Hadley's motion for summary judgment on the basis of qualified immunity. We remanded the matter to the district court to consider whether Hadley was entitled to qualified immunity in light of

"the duties inherent in plaintiffs' particular positions and Hadley's plans for the employees holding such positions." *Id.*

The action was reactivated in the district court on January 22, 1997, and Hadley filed her second motion for summary judgment shortly thereafter. The only additional discovery consisted of affidavits that Hadley and her two top assistants submitted concerning the structure of the auditor's office and the top assistants' job duties during Hadley's tenure.

On September 22, 1997, the district court granted summary judgment in favor of Hadley. The district court, taking into consideration the inherent duties of Plaintiffs' positions and the duties as envisioned by Hadley, held that Hadley reasonably could have concluded that Plaintiffs were political patronage employees who could be discharged for purely political reasons. Accordingly, the district court granted summary judgment for Hadley in her personal capacity on Count I. In addition, the district court entered judgment for Hadley on Count I in her official capacity, holding that, as political patronage employees, Plaintiffs had no First Amendment right to be free from political discharge. Finally, the district court also dismissed without prejudice Plaintiffs' state law claim for wrongful discharge (Count III). This appeal followed.

B. ***Factual Background***

Hadley, a Republican, was elected to the position of Columbiana County (Ohio) Auditor in November 1990, defeating the Democratic incumbent, Kent Bell. Kent Bell's

predecessor had been his father, Kenneth Bell, also a Democrat, and Plaintiffs worked in the auditor's office under both father and son. Plaintiffs had each publicly expressed their support for Kent Bell before the election.

When Hadley was elected, Baker and Johnson held the positions of "Office Manager" and "Chief Deputy Auditor," respectively. Allison served as the head bookkeeper. In December 1990, employees of the auditor's office, including Plaintiffs, initiated procedures to join a union in order to protect their jobs after the change of administration. In order to be eligible to join a union, Baker and Johnson submitted resignations from their job titles. However, they continued to work for Kent Bell and to perform the same responsibilities they performed under the previous job titles. Before taking office, Hadley received a letter from Kent Bell that provided her with a description of Plaintiffs' jobs. Baker was described as an "Estate Tax/Estate Inventory/License Clerk"; Johnson as a "Settlements/Abstracts/Tax Rate Specialist"; and Allison as a "Budgetary Financial Specialist."

When Hadley took office on March 11, 1991, she requested that each employee of the auditor's office complete a "desk audit," which required the employee to describe his or her job duties and responsibilities. After reviewing all of the desk audits, Hadley discharged Plaintiffs that same day. During her deposition, Hadley testified that she fired Plaintiffs because she believed that such long-time employees for the Bells would not be loyal to her. She stated that, "It was my intention to have people work for me that were loyal to me," and that, "I didn't feel that [Plaintiffs] would be able to give

me the complete trust and loyalty that I would expect from them." (J.A. at 381, 413.)

Hadley states that when she came into the office, she intended to improve the efficiency and reputation of the auditor's office. According to Hadley, this required reorganizing the office. Hadley reduced the top three administrative positions that had been held by Plaintiffs to two by eliminating entirely Baker's former position of officer manager. During her first week in office, Hadley hired John Goempel as Chief Deputy Auditor (replacing Johnson), and on April 1, 1991, she hired Nancy Milliken as Head Bookkeeper/Administrative Assistant (replacing Allison). In her affidavit, Hadley states:

> After studying the structure and management of my predecessor's office, I determined that it was necessary to terminate the top three (3) people in order to implement my plan for the future. I hired John Goempel and Nancy Milliken, as replacements, to become integral parts of my administration. I needed them to undertake activities [that] would control the flow of information from me to my office staff, other officials and also to the public. Additionally, I needed them to tell me what I needed to know about what was on other public officials' minds and how other officials, agency heads, and members of the public were being treated when they came into the Auditor's Office.

* * * *

> I needed employees whom I could trust and who could serve as close confidants and to give me advice on pending matters. I did not need a personal secretary. I did need someone that I could rely on to communicate my policy and to implement my ideas. I wanted to improve the perception of the County Auditor's Office, both within the County and throughout the State. I felt I could not do that unless I had a strong management team. John Goempel and Nancy Milliken also serve as my confidants.

(J.A. at 519-20.)

Hadley states that she relies on Goempel and Milliken to filter out the information that is important and relay it to her; to screen phone calls and correspondence; to decide what information is released to the employees in the office and to the public; to interact with the public; to deal with other elected officials and agency officials throughout the country; and to speak accurately and professionally on her behalf. In short, she claims that "she felt it was necessary to have a top management team of her personal selection [so] that she could rely on them to communicate her policy and to implement her ideas." (Hadley Br. at 11.)

Goempel and Milliken both submitted affidavits outlining their job responsibilities. These affidavits indicate that both employees make decisions on behalf of the auditor's office; help establish policies within the office; supervise other em-

ployees in the auditor's office; represent the auditor at official meetings and in communications with the public and government officials; and control the channels of communication in the office. Moreover, either Goempel or Milliken is in charge of the office in Hadley's absence. Plaintiffs do not dispute Goempel and Milliken's statements concerning their job responsibilities.

II.

We review the district court's grant of summary judgment *de novo*. *Collins v. Voinovich*, 150 F.3d 575, 577 (6th Cir. 1998). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The facts at issue are to be construed in the light most favorable to the non-moving party. *See LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993).

To state a § 1983 claim, Plaintiffs must prove that they were deprived of a right secured by the Constitution or the laws of the United States and that the deprivation was caused by a person while acting under the color of state law. *Flagg Bros. v. Brooks*, 436 U.S. 149, 155-57 (1978). The Supreme Court has held that, generally, public employees may not be terminated on the basis of their political beliefs. *See Branti v. Finkel*, 445 U.S. 507 (1980). However, the Court

has also made clear that not all governmental employees are entitled to this First Amendment protection. "[I]f an employee's private political beliefs would interfere with his discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." *Id.* at 517. The Court explained that "party affiliation may be an acceptable requirement for some types of government employment," provided that the public employee's political beliefs are "relevant to" the position in question. *Id.* at 517-18.

Before *Branti*, the Court's analysis of political patronage dismissals exclusively turned on whether the government employee held a position that entailed policymaking or that required confidentiality. *See Elrod v. Burns*, 427 U.S. 347 (1976). The Court in *Branti* modified the standard: "The ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518.

A.

We have held that, in determining whether political affiliation is an appropriate requirement for an employment position, courts should examine (i) the inherent duties of the position and (ii) the duties as envisioned by the incoming officeholder, rather than a particular plaintiff's job functions. "To determine whether political considerations are appropri-

ate in making personnel decisions for a certain position, we must examine the inherent duties of that position and the duties that the new holder of that position will perform. A plaintiff's failure to meet either part of this test would cause the claim to be dismissed." *Faughender*, 927 F.2d at 913.

Plaintiffs contend that the district court erred in not looking to their particular job functions in determining whether political affiliation was an appropriate requirement for Plaintiffs' positions. Plaintiffs maintain that summary judgment was inappropriate because, viewed in the light most favorable to them, the evidence shows that their actual duties under Kent Bell were ministerial and non-policymaking.

However, this Court has consistently held that whether political considerations are appropriate in specific personnel decisions does not depend on a particular plaintiff's actual job functions. For example, in *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990), the plaintiff argued that political affiliation was not an appropriate requirement for his former duties as city attorney because he had worked only part-time and did not play an active role in the city's litigation. However, we refused to limit our inquiry to the plaintiff's particular job functions because such a narrow focus would unfairly limit the ability of future elected officials to establish their own style of governing. *Id.* at 154-55. Even if the previous mayor had delegated only ministerial tasks to the city attorney, we declined to adopt an approach that would "bind a later mayor to employ the City Attorney in the way that the official had been employed in the past." *Id.* at 155. Instead,

we found that "the duties inherent in the position of the City Attorney indicate that a relationship of confidence and trust between the City Attorney and the Mayor and the Council is necessary to the effective performance of the job." *Id.* Accordingly, we held that the plaintiff did not enjoy First Amendment protection against political discharge.

This is not to say that a plaintiff's actual job functions are never relevant. The inherent duties of a particular position are not always readily apparent by the title or general job description. *See McCloud v. Testa*, 97 F.3d 1536, 1558-59 (6th Cir. 1996). This is particularly true when no statute exists to define the contours and responsibilities of a particular position. *Id.* at 1558. When the inherent duties are not readily discernible, courts may look to the duties as the plaintiff actually performed them as evidence of what the position inherently entails. Accordingly, we recently observed that even though we do not normally look at the job as performed by the plaintiff, "in some cases . . . a plaintiff's actual duties may nonetheless serve as evidence of the duties inherent in the position." *Feeney v. Shipley*, --- F.3d ---, 1999 WL 4920 at *11 (6th Cir. 1999). For example, in *Smith v. Sushka*, 117 F.3d 965 (6th Cir. 1997), the plaintiff argued that she was improperly dismissed for political reasons from her position as an administrative assistant to a county engineer in Ohio. We concluded that "the job as actually performed" by the plaintiff demonstrated that the "inherent duties" of her position were political in nature, and, therefore, the plaintiff did not enjoy First Amendment protection against patronage dismissal. *Id.* at 970-71.

B.

In this case, however, we need not concern ourselves with Plaintiffs' particular job responsibilities under Kent Bell because our decision does not rest on a finding that the inherent duties of Plaintiffs' positions entailed policymaking or required confidentiality. While "[t]he two tests outlined in *Faughender*, 'the job as actually performed' and 'the job as envisioned,' are not completely separate and independent[,] . . . if one or the other test is clearly and directly applicable, the other is not independently necessary, although it may be somewhat informative." *Smith*, 117 F.3d at 970 (citing *McCloud*, 97 F.3d at 1561).

We agree with the district court that Plaintiffs' positions within the county auditor's office were not afforded First Amendment protection because Hadley envisioned these positions to be confidential, policymaking jobs for which political affiliation was an appropriate requirement.[1] Hadley has presented undisputed evidence that in her reorganization of the county auditor's office, her top assistants serve confidential and policymaking roles. Specifically, in the restructured office Goempel and Milliken perform such functions as speaking on Hadley's behalf at official meetings and in communications with the public and government officials; managing the office in her absence; helping to establish policies within the office and supervising other employees; controlling the lines of communication to Hadley; and exercising decision-making authority over substantive matters handled by her office.

[1] Political affiliation" is not strictly limited to partisan alliance, but instead "includes commonality of political purpose and support of political candidacy." *Smith*, 117 F.3d at 970 n.6 (citing *McCloud*, 97 F.3d at 1548).

These functions are similar to the kinds of positions this Court repeatedly has found to be subject to patronage dismissals. *See, e.g., Feeney*, --- F.3d ---, 1999 WL 4920 (holding that a state department of transportation employee was subject to patronage dismissal where his duties included serving as a liaison between the director of the department and the general public and other government officials, including representing the department at meetings and conferences); *Smith*, 117 F.3d at 967-71 (holding that the administrative assistant to the county engineer could be dismissed for political reasons where she had significant interaction with county commissioners and routinely fielded their questions concerning the budget; accompanied the engineer to official meetings; supervised other employees within the engineer's office; and had the authority to approve expenditure requests within the office); *McCloud*, 97 F.3d at 1561 (holding that the administrative assistant to the County Deputy Auditor was subject to political dismissal because she controlled the lines of communication of a political actor with discretionary authority).

On the other hand, Plaintiffs' evidence, taken in the light most favorable to them, shows only that they may not have performed political or policymaking tasks when they worked under Kent Bell. This evidence does not demonstrate that their positions were "inherently" non-confidential or non-policymaking. *See Faughender*, 927 F.2d at 913. Baker and Johnson for a time held the titles of "Office Manager" and "Chief Deputy Auditor," respectively -- which suggests the potential for considerable authority within the office, particularly in light of Goempel's duties as Chief Deputy Auditor under Hadley. Allison served as the head bookkeeper, which

is the position currently occupied by Milliken. The record indicates that, whatever their daily functions, Plaintiffs reported directly to Kent Bell and served as his top three assistants.

This Court has expressly held that government officials may freely reorganize their departments, even if that entails transforming a previously ministerial position into a confidential or policymaking one. For example, in *Faughender*, the plaintiff was dismissed from her position as the mayor's secretary despite her claims that her actual job functions were purely ministerial and non-confidential. We upheld a grant of summary judgment for the defendant where the new mayor presented evidence that she envisioned her new secretary as a confidante, even if the plaintiff had not served such a role under the old mayor. This Court made clear that the new mayor had unlimited discretion in structuring her administration, even if the restructuring entailed transforming a previously non-political position into a political one:

> Our decision that administrative officials entrusted by the people with executive power may reorganize their departments without running afoul of *Elrod, Branti,* and *Rutan* applies to all positions, whether or not their prior duties were political. A mayor could decide to transform any non-civil service position into a position for which political considerations are appropriate provided he acts with a good faith belief that such a transformation is necessary to implement his policies. . . . A newly-elected

> administration is surely hampered in implementing its new policies if it cannot change a position's responsibilities solely because the current incumbent does not perform the new duties.

Id. at 914-15. *See also Williams*, 909 F.2d at 154-55 (noting that, even though the prior city attorney had served only part-time limited functions, the newly-elected mayoral administration was entitled to mosve in the direction of a more active and involved city attorney with its transformation of the job into a full-time position).

We imposed only one requirement on a newly-elected official seeking to transform previously ministerial positions into confidential or policymaking ones: the official must act "with a good faith belief that such a transformation is necessary to implement his policies." *Faughender*, 927 F.2d at 914. In her affidavit submitted with her second motion for summary judgment, Hadley states that her plan to improve the efficiency and reputation of the auditor's office required that her top assistants assume responsibilities traditionally deemed political, such as giving advice on policy matters, communicating with the public and other government officials, and supervising other employees in the auditor's office.

However, Plaintiffs claim that Hadley's "restructuring" of the auditor's office was not made in good faith, but rather serves as mere pretext for unlawful political discharge. Plaintiffs argue that in the initial round of discovery preceding Hadley's first motion for summary judgment, Hadley did not expressly cite office restructuring as the underlying reason

for Plaintiffs' terminations. Instead, Hadley testified only that she fired Plaintiffs because she believed that such long-time employees for the Bells would not be loyal to her. Hadley did not submit the affidavits concerning restructuring until after this Court remanded the case back to the district court with express instructions to consider the inherent duties of Plaintiffs' positions and the duties as Hadley envisioned them to be. Plaintiffs maintain that this evidence indicates that Hadley's restructuring claim is simply a ploy to secure dismissal of their suit.

We disagree. The mere fact that Hadley did not initially phrase her position in the precise terms of "restructuring" or "reorganization" does not suggest that her affidavit was submitted in bad faith. We perceive no inconsistency between Hadley's deposition testimony and her subsequent affidavit. Read together, this evidence indicates that Hadley wanted "loyal" employees precisely because she envisioned her top assistants as confidants and policymakers. Moreover, Hadley's conduct upon taking office supports this view. Hadley hired Goempel as Chief Deputy Auditor during her first week in office, and she hired Milliken as Administrative Assistant/ Head Bookkeeper within three weeks of taking command. The office restructuring was thus implemented immediately, while Plaintiffs did not file suit until March 1992 -- after Hadley's office structure had been in place for nearly a year. As a result, we find no evidence of bad faith.

Accordingly, we find that Hadley has presented sufficient evidence that, in her administration, her top assistants fill positions for which political affiliation is an appropriate

requirement for the effective performance of the county auditor's office. Therefore we hold that Plaintiffs have failed to establish that they enjoyed a constitutional right to be free from political dismissal from their positions in the auditor's office.

III.

Because Plaintiffs have failed to establish that they were deprived of any constitutional rights, the district court properly dismissed Count I of the complaint. In addition, because we hold that no constitutional violation occurred, we need not address the issue of whether Hadley enjoyed qualified immunity from suit. *See Salehpour v. University of Tennessee*, 159 F.3d 199, 208 (6th Cir. 1998) (stating that qualified immunity analysis is appropriate only where it is first found that a constitutional violation had occurred). Finally, given the absence of any viable federal claims, the district court properly dismissed Plaintiffs' state law claim for wrongful discharge (Count III). *See Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1254-55 (6th Cir. 1996).

For the foregoing reasons, we AFFIRM the grant of summary judgment in favor of the defendant, Patricia Hadley.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Judy Baker, et al.,	)	CASE NO. 4: 92 CV 00495
	)	
Plaintiffs,	)	JUDGE PATRICIA A.
	)	GAUGHAN
vs.	)	
	)	
Patricia Hadley,	)	
	)	Memorandum of
Defendant.	)	Opinion and Order

Pending before the Court is Defendant's Motion for Summary Judgment. (Doc. 63.) For the reasons set forth below, the motion is granted insofar as it seeks judgment on the federal claims asserted against Hadley in Count I.

Background Facts

Defendant Pat Hadley, a Republican, was elected to the position of Columbiana County, Ohio Auditor in November 1990. In the election, Hadley defeated the democratic incumbent, Kent Bell. Prior to Kent Bell's term, the office was held by his father Kenneth Bell. Plaintiffs Judy Baker, Bonnie Johnson and Myra Allison worked in the county auditor's office under both Kent and Kenneth Bell. Plaintiffs publicly supported Kent Bell for the position of auditor in the November 1990 election against Hadley. At the time of the election, Baker held the position of "Office Manager," and Johnson held the position of "Chief Deputy Auditor." Myra Allison served under Bell as "Head Bookkeeper."

After the November 1990 election, employees of the auditor's office including plaintiffs initiated procedures to join a union in order to protect their jobs after the change of administration. In order to be eligible to join a union, Baker and Johnson submitted resignations from their positions. However, Baker and Johnson continued to work for Bell and to perform the same responsibilities they performed when they were "Office Manager" and "Chief Deputy Auditor."

After the election and prior to Hadley's taking office, Bell provided Hadley with a letter setting forth descriptions of plaintiffs' jobs. Bell described Baker as an "Estate Tax/Estate Inventory/License Clerk," Johnson as a "Settlement/Abstract/ Tax Rate Specialist" and Allison as a "Budgetary Financial Specialist."

Hadley took office on March 11, 1991. That day, she requested that all employees of the office complete a "desk audit" requiring them to describe their job responsibilities. Hadley conducted the audits to determine who she needed to "trust and rely on." Based on the desk audits and Hadley's own prior dealings with the county auditor's office, Hadley concluded that plaintiffs were in managerial positions that required complete trust and loyalty. Because Hadley believed that plaintiffs would not be completely loyal to her and would not adapt to her philosophy of how the office should be run, Hadley discharged the plaintiffs on March 11, 1991.

Hadley eliminated Baker's position entirely. Hadley hired John Goempel to fill the position of "Chief Deputy Auditor." Hadley hired Nancy Milliken as "Administrative Assistant/ Head Bookkeeper."

On March 9, 1992, plaintiffs filed this action against Hadley under 42 U.S.C. §§ 1983, 1985 and 1988 in her individual capacity and in her capacity as Auditor of Columbiana County. In Count I, plaintiffs allege that Hadley discharged them for political reasons as a result of their support for Bell in violation of their First and Fourteenth Amendment rights of free speech and political association. In Count II, plaintiffs allege that they were discharged for their attempts to unionize the county auditor's office in violation of their First and Fourteenth Amendment rights. In Count III, plaintiffs allege that their termination based on their union activity also constituted wrongful discharge under Ohio law.

On April 7, 1994, Hadley moved for summary judgment on all counts. Among other things, Hadley argued that she was entitled to summary judgment as to the federal claims asserted against her in her individual capacity on the basis of qualified immunity. Although Hadley denied that she terminated plaintiffs for political reasons, Hadley argued that it was appropriate for her to terminate plaintiffs for such reasons because plaintiffs held high level confidential managerial positions in the auditor's office. Those kinds of positions, Hadley argued, were not protected from patronage dismissal under governing precedent. Plaintiffs filed a cross-motion for summary judgment on the issue of qualified immunity arguing that Hadley was not entitled to qualified immunity. They argued that their positions under Auditor Bell were not high level confidential managerial positions and thus were protected from patronage dismissal.

On December 6, 1994, the district court denied Hadley's motion for summary judgment as to Counts I and III and granted Hadley's motion for summary judgment as to Count II. (*See* December 6, 1994 Order) (Wells, J.) The court denied plaintiffs' motion for partial summary judgment in its entirety. In denying Hadley's motion for summary judgment as to Count I, the district court found that at the time Hadley fired plaintiffs, it was clearly established that nonpolicymaking, nonconfidential employees were protected from being fired because of political affiliation under the First and Fourteenth Amendments. (*Id.* at 3, *citing Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980).) However, the district court held that summary judgment was not appropriate because there were "material issues of fact regarding Hadley's awareness of Plaintiffs' political affiliation at the time of Plaintiffs' discharge." (*Id.* at 4.) In addition, the court stated that the parties' "[c]ontending assertions of Plaintiffs' duties at the County Auditor's Office" under Auditor Bell also "require[d] resolution by a fact-finder." (*Id.*) The court similarly denied plaintiffs' motion for summary judgment on the issue of qualified immunity on the ground of the factual dispute as to "Plaintiffs' roles at the County Auditor's Office prior to their discharge." (*Id.* at 6.) The court denied Hadley's motion for summary judgment as to Count III on the basis of an exception to Ohio's general rule of employment at will where employees are discharged in contravention of a clear public policy derived from state or federal constitutional law. (*Id.* at 5.)

On January 4, 1995, Hadley filed a notice of appeal on the limited issue of the district court's denial of her motion on

the ground of qualified immunity. (Plaintiffs filed a cross appeal, but the Sixth Circuit dismissed the cross-appeal for lack of jurisdiction due to its interlocutory nature.)

The Sixth Circuit reversed the district court's order denying Hadley's motion for summary judgment on the basis of qualified immunity. *Baker v. Hadley*, 72 F.3d 129, 1995 WL 717029 (6th Cir. 1995) (unpublished per curiam), *cert denied*, 116 S. Ct. 1876 (1996) ("Sixth Cir. Ord."). The Sixth Circuit found that the district court misapplied the law. The Court stated that Sixth Circuit precedent establishes that "when determining whether political considerations are appropriate in making personnel decisions for a certain position, a district court should not look to the duties previously performed by the plaintiff. Instead, the court must examine the inherent duties of that position and the duties that the new hiring authority, *ie.*, Hadley, reasonably envisions the holder will perform." (Sixth Cir. Order at 9, *citing Faughender v. City of North Olmsted*, 927 F.2d 909 (6th Cir. 1991).) The Court stated that the record did "not contain any evidence of what duties Hadley envisioned that the holder of plaintiffs' position would perform." Therefore, the Court reversed the district court's denial of Hadley's motion for summary judgment on the basis of qualified immunity and remanded the matter to the district court to consider whether the law was clearly established that plaintiffs' positions were protected from patronage dismissal at the time Hadley discharged plaintiffs in light of "the duties inherent in plaintiffs' particular positions and Hadley's plans for the employees holding such positions." (*Id.* at 10.)

On January 18, 1996, this case was transferred to this Court's docket. On March 21, 1996, this Court entered an order staying the case as plaintiffs filed a petition for a writ of certiorari to the Sixth Circuit's decision in the Supreme Court. The case was reactivated on January 22, 1997 after the Supreme Court denied the petition for a writ.

On February 19, 1997, Hadley filed the pending motion for summary judgment requesting judgment on the remaining claims against her, *i.e.*, the constitutional claim against her for allegedly terminating plaintiffs for political reasons in violation of their First and Fourteenth Amendment rights (Count I) and the state law claim for wrongful discharge for allegedly firing plaintiffs for their attempts to unionize the county auditor's office (Count III).

Hadley argues that she is entitled to judgment in her favor on the basis of the new evidence she submits in support of her motion. The evidence Hadley submits (her affidavit and the affidavits of John Goempel and Nancy Milliken) is essentially evidence of what she envisions plaintiffs' jobs at the county auditor's office under her administration will entail. (*See* Mot. at 6-10.)

Hadley states that when she came into office, she intended "to improve the efficiency and reputation of the Columbiana County Auditor's Office." (Mot. at 5.) To do so she states, "it was necessary to reorganize [the] office." (*Id.*) She avers:

> After studying the structure and the management of my predecessor's office, I determined it was necessary to terminate the top three (3) people in order to implement my plan for the future. I hired John Goempel and Nancy Milliken, as replacements, to become integral parts of my administration. I needed them to undertake activities which would control the flow of information from me to my office staff, other officials and also to the public. Additionally, I needed them to tell me what I needed to know about what was on other public officials minds and how other official agency heads, and members of the public were being treated when they came into the Auditors Office.

(Hadley Aff. at ¶ 2.) Hadley states that in order to implement her plan she needed the top management employees to be 100% loyal to her.

Hadley states that she relies on John Goempel and Nancy Milliken to "filter out the information that is important" and "relay it to her," "to screen phone calls, correspondence and decide what information is released to the employees [in the office] and the public," "to treat the public professionally and fairly," to "deal with other elected officials and agency officials throughout the country" and to "speak accurately and professionally" on her behalf (Mot. at 6-7.)

Goempel avers that as Chief Deputy Auditor he updated and implemented the Atek County computer program and met with county officials, outside vendors and employees re-

garding the system; has responsibility for disciplining, supervising and advising 12 employees and for ensuring that the public is treated fairly; reports directly to Hadley; prepares Certificate of Estimated Resources for the Township, School Districts, Corporations and discusses budgets with elected officials; represents Hadley at Budget Commission and Board of Revision meetings; prepared budget booklet for reference for school districts and handles budget questions from township trustees; serves as liaison to the Tax Commissioner of the Ohio Department of Taxation; obtains information from staff and decides what should be reported to the Department of Taxation; fields questions from the Tax Commissioner; coordinates preparation of DT93 Forms with other County Auditor's offices; fields complaints from taxpayers; attends public meetings to explain the effects of school tax levies; and attends Salem City Council meetings to explain the effects of tax abatements. (Goempel Aff.)

Milliken avers that in her job she balances over 200 funds; assists with the budgetary process by preparing Certificate of Estimated Resources for special funds and county agencies; reviews appropriation adjustments and controls daily cash balance of the general fund; discusses process of paying bills with agency heads and county treasurer; explains what bills are being paid, when bills were paid and why a bill was not paid; attends county Insurance Committee meetings, Budget Revision Hearings, Microfilm Board Meetings and Data Processing Board Meetings; represents Hadley at County Auditor's Conference and in visiting other county auditor's offices to study their operations; developed personnel manual;

determines the important information from other county officials that should be relayed to Hadley and relays such information to Hadley; supervises warrant and payroll clerks; developed a purchase order procedure; represented Hadley in meeting with County Commissioners; educated various departments on the purchase order procedure and conducted seminars on the procedure; and represents Hadley in discussions with the Auditor of State's Office about their questions concerning Columbiana County's finances. (Milliken Aff.) In addition, Milliken avers that either she or Goempel are in charge of the office in Hadley's absence. (*Id.* at ¶ 15.)

Plaintiffs do not dispute Hadley's contentions as to how Hadley envisions the office's top management positions or Goempel's and Milliken's statements as to what their jobs at the auditor's office actually entail. However, plaintiffs contend that their positions at the county auditor's office under Auditor Bell were not, as Hadley classifies them, top level managerial positions. Instead, plaintiffs argue that under Bell, they were merely low level ministerial, "grunt" workers with no decision-making authority. Plaintiffs argue:

> These Plaintiffs were "grunt" workers. They did not have any policy making or decision making authority. They performed routine and ministerial job duties. The Plaintiffs' jobs consisted of the performance of duties in the Auditor's office, including record-keeping and ministerial functions.... All of the Plaintiffs did routine work, following standard office procedures. None of them had any authority to change the procedures.... None of these employ-

> ees served in a fiduciary capacity or bore a confidential relationship to the Auditor. . . , none of the Plaintiffs had any authority to hire, fire or discipline other employees ... nor did any of the three Plaintiffs perform duties which another person could not do with training.

(*See* Pltf Br. at 13.)

Thus, plaintiffs argue that their positions at the auditor's office do not fall within the classes of jobs that the Sixth Circuit determined to be subject to political patronage dismissal in *McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996). Plaintiffs argue that as to the positions they performed for the auditor, politics was not a "legitimate requirement." (Pltf Br. at 14.) In addition, plaintiffs argue that in focusing exclusively on how Hadley envisions Goempel's and Milliken's positions in her administration, Hadley completely ignored the Sixth Circuit's statement that "the inherent duties" of plaintiffs' positions, as well as how Hadley envisioned the positions, needed to be assessed in determining whether Hadley was entitled to qualified immunity. (*See* Pltf. Br. at 14, citing Sixth Circuit's Order.)

Hadley replies that *McCloud v. Testa* was decided after Hadley discharged plaintiffs and therefore does not constitute "clearly established law" for the purposes of determining whether Hadley is entitled to qualified immunity. In addition, Hadley argues that plaintiffs' positions fit within the categories of positions identified in *McCloud* as subject to patronage dismissal. Hadley also argues that plaintiffs "make no attempt"

in their brief to address the positions as Hadley envisions them. (Rep. at 8.)

Standard of Review

Fed. R. Civ. P. 56(c) governs summary judgment and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.. . .

A party that does not bear the burden of proof at trial establishes entitlement to summary judgment by "identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-325(1986). The non-moving party can then withstand summary judgment only by coming forward with evidence showing a genuine issue of fact for trial. *Id.* at 324. A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). In reviewing summary judgment motions, the Court must view the evidence in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Assn., Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990).

Discussion

Government officials performing discretionary functions are generally shielded from personal liability for civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Buckner v. Kilgore*, 36 F.3d 536, 539 (6th Cir. 1994). "[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized." *McCloud v. Testa*, 97 F.3d at 1553 (quoting *Cagle v. Gilley*, 957 F.2d 1347, 1348 (6th Cir. 1992)). "To hold that a right is clearly established, a district court must usually find binding precedent from the Supreme Court, the Sixth Circuit, or from itself." *Id.* "Although decisions from other courts can clearly establish the law, such decisions must both point unmistakably to the unconstitutionality of the conduct and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct was unconstitutional." *Id, quoting Cagle*, 957 F.2d at 1348.

At the time Hadley discharged plaintiffs, there was Supreme Court and Sixth Circuit precedent addressing the circumstances under which politically motivated discharge of government employees violates the First Amendment. As the Sixth Circuit panel that decided Hadley's appeal stated, at the time of Hadley's action, a plurality of the Supreme Court had concluded in *Elrod v. Burns*, 427 U.S. 347 (1976), "that 'a nonpolicymaking, nonconfidential government employee can[not] be discharged or threatened with discharge from a

job that he is satisfactorily performing upon the sole ground of his political beliefs." (Sixth Cir. Order at 8, *quoting Elrod.*) The panel acknowledged that the Supreme Court modified that test in *Branti v. Finkel*, 445 U.S. 507 (1980), to "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." (*Id., quoting Branti.*) Although the panel did not refer to *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), the Supreme Court held in that case that the *Branti* exception applied to employees for whom "political affiliation is relevant to the quality of public service. . . ."

At the time Hadley discharged plaintiffs, the Sixth Circuit had analyzed the duties and responsibilities of several positions under the *Elrod-Branti* framework established by the Supreme Court. For example, in *Balogh v. Charron*, 855 F.2d 356 (6th Cir. 1988), the Court held that a state trial judge did not violate the First Amendment for discharging his bailiff allegedly because the bailiff supported the judge's opponent for reelection. The court reasoned that the discharge did not violate the principles established in *Elrod-Branti* because a "bailiff to the judge ... is a confidential employee. As a judicial aide, his confidential relationship arises because he handles sensitive communications for the judge, acts as his bodyguard and may discuss and learn about the outcome of cases pending before the judge before the decision is announced to the public." *Id* at 356. The *Balogh* Court emphasized that

> [T]he test of confidential employment does not depend on the subjective view of the employee concerning the trust the judge reposes in him, not does

> it depend on the subjective view of the judge concerning the need for intimacy or trust. It is a more objective standard. It depends on the functions of the job. Judicial aides who work in chambers and are assigned to one judge as court officer, bodyguard and general assistant normally handle sensitive information about cases of a confidential nature... Judges must be able to rely on the confidentiality of the relationship with such aides, just as they must rely on the confidentiality of their relationship with their private secretaries and law clerks. The need for confidentiality between a judge and the staff in his immediate chambers is no less necessary that the need for confidentiality between legislators and their aides.
>
> *Id.*

In *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990), the Court held that it did not violate the First Amendment for a city attorney to be discharged on the basis of his support for the newly-elected mayor's opponent. The Court reached this conclusion on the basis of statements by the mayor's counsel at oral argument that the city attorney's "primary duty is to the people of the City ... through their elected officials" and statements by the mayor that he believed it was necessary for him to appoint a city attorney in whom he had "trust and confidence" in order to be an effective administrator of city government. *Id* at 154.

The *Williams* Court directed that "[w]hen examining a public office for first amendment protection against politically-motivated dismissal, the relevant focus of analysis is the inherent duties of the position in question, not the work actually performed by the person who happens to occupy the office." *Williams v. River Rouge*, 909 F.2d 151, 154 (6th Cir. 1990).

In light of this authority and *Faughender v. City of North Olmsted*, 927 F.2d 909, 913 (6th Cir. 1991), the Sixth Circuit panel in this case remanded this matter for further consideration as the district court originally denied Hadley's motion for summary judgment on the basis of qualified immunity on the ground that there were factual disputes as to the nature of plaintiffs' jobs as plaintiffs performed them under Bell. As the Sixth Circuit panel pointed out, however, *Williams* establishes that the nature of the work previously performed by plaintiffs is not relevant in determining whether they are protected from patronage dismissal. Instead, the Sixth Circuit stated that the relevant inquiry is "the inherent duties of [plaintiffs'] position and the duties that the new hiring authority, ie., Hadley reasonably envisions the holder of that position will perform." (Sixth Cir. Ord. at 9.)

Plaintiffs' evidence, taken in the light most favorable to them, shows only that they performed ministerial nonpolicymaking functions when they worked under Auditor Bell. (*See* Plft. Br.) (As previously stated, the Sixth Circuit has made clear that how the plaintiffs performed their jobs under Bell is not relevant in assessing whether they may be constitutionally discharged for political reasons.) Plaintiffs do

not argue, however, that their positions are "inherently" nonconfidential or nonpolicymaking.

Although Hadley does not argue that plaintiffs' positions are "inherently" confidential and/or policymaking, she submits evidence that in her reorganization of the county auditor's office, she envisioned plaintiffs' positions to be confidential, policymaking jobs. In particular, she envisioned Goempel and Milliken to perform such functions as speaking on her behalf, managing the office in her absence, representing her in office matters, controlling lines of communication to her and exercising decision-making authority over substantive matters handled by her office. (*See* Hadley Mot.) These functions are similar to the kinds of positions the Sixth Circuit had found to be subject to patronage dismissal at the time Hadley discharged plaintiffs. *See, e.g, Balogh*, 855 F.2d 356 (bailiff); *Williams*, 909 F.2d 151 (city attorney). Hadley also submitted evidence that Goempel and Milliken actually perform such functions.

Plaintiffs do not dispute either Hadley's vision for the top managerial positions in her administration or the nature of the functions that Goempel and Milliken actually perform. Instead, plaintiffs contend that Hadley incorrectly perceived them to have held top level managerial positions under Auditor Bell and argue that it was not reasonable for her to replace their positions (which in reality were merely low level grunt jobs) with top managerial positions. (*See* Pltf. Br. at 4, 14.) However, the Sixth Circuit expressly stated in *Faughender* that "administrative officials entrusted by the people with executive power may reorganize their departments without run-

ning afoul of *Elrod, Branti*. . ." so long as the official "acts with a good faith belief that such a transformation is necessary to implement his policies." *Faughender*, 927 F.2d at 914. Plaintiffs do not argue that Hadley intentionally misunderstood the nature of their jobs nor do they contend that Hadley's reorganization of the county auditor's office was anything other than a good faith effort to implement her new policies as county auditor. Therefore, plaintiffs have not rebutted that Hadley envisioned their positions to be confidential, policymaking jobs.

Plaintiffs argue that Hadley is not entitled to qualified immunity because their positions do not fit within the categories of positions identified as subject to patronage dismissal by the Sixth Circuit in *McCloud v. Testa*, 97 F.3d 1356 (6th Cir. 1996).[1] (*See* Pltf Br. at 11-13.) *McCloud*, however, was decided nearly six years after Hadley discharged the plaintiffs in this case and nearly a year after the Sixth Circuit panel handed down its decision on Hadley's appeal of the district court's denial of her motion for summary judgment on the ground of qualified immunity. *McCloud*, therefore, should not serve as the framework for assessing whether Hadley is entitled to qualified immunity for her actions in 1991. In any event, while *McCloud* appears to alter somewhat the frame-

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[1] *McCloud*, like this case, involved patronage dismissals by a newly-elected county auditor.

work for analyzing whether an official is entitled to qualified immunity for political patronage dismissals,[2] *McCloud* in no way alters the fundamental law established in *Elrod-Branti* that confidential policymaking positions are subject to patronage dismissal, or the law established by the Sixth Circuit in

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[2] *McCloud* set forth four categories of positions which the district courts can consider in determining whether a particular position is subject to patronage dismissal. That is, a position is subject to patronage dismissal if it falls within one of the following categories:

Category One: positions specifically named in relevant federal, state, county, or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some policy of political concern is granted;

Category Two: positions to which a significant portion of the total discretionary authority available to category one position holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction's pattern or practice the same quantum or type of discretionary authority commonly held by category one positions in other jurisdictions;

Category Three: confidential advisors who spend a significant portions of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority, or other confidential employees who control the lines of communications to category one positions, category two positions or confidential advisors;

Category Four: positions that are part of a group of positions filled by balancing out political party representation or that are filled by balancing out selections made by different governmental agents or bodies.

Balogh and *Williams*. Nor does *McCloud* overrule the principle established in *Faughender* that the nature of a newly-redefined position for purposes of assessing the constitutionality of a political patronage dismissal must be analyzed from the perspective of how the new officer holder who redefined the position envisions it.

As plaintiffs' positions as they were envisioned by Hadley and performed by Goempel and Milliken are the types of confidential policymaking positions that are subject to patronage dismissal under the test set forth in *Faughender* (which the Sixth Circuit panel expressly directed this Court to consider in assessing whether Hadley is entitled to qualified immunity), the Court grants Hadley's motion for summary judgment insofar as it pertains to plaintiffs' First Amendment claim (Count I) against Hadley in her personal capacity on the ground of qualified immunity.

Hadley argues in her motion that the new evidence entitles her to summary judgment as to the "entire matter." (*See* Hadley Mot. at 17.) The Court assumes this means that Hadley is also moving for summary judgment on Count I insofar as it is brought against her in her official capacity, as well as on Count III (the state law claim for wrongful discharge) as those are the only other claims remaining in the action.

The Court agrees with Hadley to the extent she argues she is entitled to summary judgment as to Count I insofar as it is brought against her in her official capacity. The Court recognizes that a claim brought against Hadley in her official capacity is, in effect, an action against the county and that

governmental entities are not entitled to qualified immunity. (*See Marsh v. Ant*, 937 F.2d 1056 (6th Cir. 1991).) However, *Faughender* establishes that there is no First Amendment right to be free from political patronage dismissal from positions envisioned by a newly-elected official to be confidential, policymaking positions under the *Elrod-Branti* framework. See *Faughender*, 927 F.2d 909. Thus, *Faughender* establishes that plaintiffs have no First Amendment claim against Hadley either in her personal or her official capacity. Accordingly, the Court grants Hadley's motion for summary judgment insofar as it relates to Count I of the complaint.

The only remaining claim in this action is plaintiffs' state law claim for wrongful discharge (Count III). The Court dismisses Count III without prejudice in light of the Court's conclusion that summary judgment is appropriate on plaintiffs' First Amendment claims. See *Pilgrim v. Littlefield*, 92 F.3d 413, 417 (6th Cir. 1996) ("Without a viable federal claim in the case, and absent some compelling basis for retaining supplemental jurisdiction, there [is] no reason for the district court not to dismiss the case.")

Conclusion

For the reasons stated above, the Court grants Hadley's motion for summary judgment insofar as it relates to the claims asserted against her in Count I. The Court dismisses Count III without prejudice in light of the absence of a viable federal claim in the case.

IT IS SO ORDERED.

/S/
PATRICIA A. GAUGHAN
United States District Judge

NOT FOR PUBLICATION

No. 95-3038
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUDY BAKER; MYRA ALLISON; and BONNIE JOHNSON, Plaintiffs-Appellees, v. PAT HADLEY, Columbiana County Auditor, Defendant-Appellant.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on the other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

BEFORE: ENGEL, MILBURN, and NORRIS, Circuit Judges.

PER CURIAM. Defendant Pat Hadley appeals the district court's order denying her motion for summary judgment based on qualified immunity in this civil rights action arising under 42 U.S.C. § 1983. On appeal, the issue is whether the district court erred in determining that material issues of fact required it to deny defendant's motion. For the reasons that follow, we reverse and remand.

I.

A.

Defendant Pat Hadley, a Republican, was elected to the position of Columbiana County (Ohio) Auditor in November 1990. In the election, Ms. Hadley defeated the Democratic incumbent, Kent Bell. Prior to Kent Bell's term as Columbiana County Auditor, the office was held by his father, Kenneth Bell, who was also a Democrat. Plaintiffs Judy Baker, Bonnie Johnson, and Myra Allison worked in the County Auditor's Office under both Kent and Kenneth Bell. In their complaint, plaintiffs state that they had each publicly expressed their support for Kent Bell before the election.

At the time that defendant Hadley was elected, plaintiffs Judy Baker and Bonnie Johnson held the positions of office manager and chief deputy auditor, respectively. However, on December 17, 1990, prior to the date Hadley took office, both Baker and Johnson submitted resignations from their job titles but continued to work for Auditor Bell. Baker and Johnson's job responsibilities did not change after they resigned from their respective titles. Prior to taking office, Auditor-Elect Hadley received a letter from then Auditor Bell that provided Hadley with descriptions of plaintiffs' jobs. Bell described plaintiff Baker's position as "Estate Tax/Estate Inventory/License Clerk," plaintiff Johnson's position as "Settlements/Abstracts/Tax Rate Specialist," and plaintiff Myra Allison's position as "Budgetary Financial Specialist." J.A. 568. In their complaint, plaintiffs alleged that their positions were "neither policy-making nor confidential." J.A. 9.

Defendant Hadley took office on March 11, 1991. That day, she requested that all employees of the Auditor's Office complete "desk audits," which required the preparer to describe his or her job duties and responsibilities. In her deposition, Hadley explained that the purpose of the desk audits was to determine who she needed to "trust and rely on." J.A. 505. Based on these desk audits and Hadley's previous dealings with the County Auditor's Office, Hadley concluded that plaintiffs were in managerial positions that required their complete trust and loyalty. Because Hadley felt that plaintiffs would not be completely loyal to her and would not adapt to her philosophy of how the County Auditor's Office should be run, Hadley discharged plaintiffs that same day, March 11, 1991.

B.

On March 9, 1992, plaintiffs Judy Baker, Myra Allison, and Bonnie Johnson filed a three-count complaint against defendant Pat Hadley. Plaintiffs brought their claims under 42 U.S.C. §§ 1983, 1985, and 1988, and under Ohio law. Count I alleged that Hadley violated plaintiffs' First and Fourteenth Amendment rights of freedom of speech and political affiliation by discharging them because they supported the Democratic incumbent, Kent Bell, in the election. Count II alleged that plaintiffs were terminated in violation of their First and Fourteenth Amendment rights with regard to their attempts to unionize the County Auditor's Office. Count III alleged that their termination because of their union activity also constituted wrongful discharge under Ohio law.

On April 7, 1994, defendant Hadley filed a motion for summary judgment arguing, among other things, that she was entitled to qualified immunity as to Count I of the complaint. Plaintiffs filed a motion for partial summary judgment regarding defendant's assertion of qualified immunity on May 4, 1994. On December 6, 1994, the district court granted in part and denied in part defendant's motion for summary judgment and denied plaintiffs' motion. The district court denied defendant's motion for summary judgment on qualified immunity grounds as to Count I of the complaint because it concluded that material issues of fact regarding plaintiffs' duties at the County Auditor's Office and Hadley's awareness of plaintiffs' political affiliations at the time of plaintiffs' discharge prohibited summary disposition of the qualified immunity issues.

On January 4, 1995, defendant filed a notice of appeal limited to the issue of the district court's denial of her motion for summary judgment on qualified immunity grounds. Plaintiffs filed a notice of cross-appeal, in which plaintiffs raised issues other than qualified immunity, on January 18, 1995, but this court dismissed plaintiffs' appeal for lack of jurisdiction due to its interlocutory nature.

II.

Defendant argues that the district court erred in denying her motion for summary judgment based on qualified immunity. Specifically, defendant asserts that the district court failed to determine whether the law that plaintiffs allege that she violated was clearly established at the time she fired plaintiffs

because the district court improperly found that genuine issues of material fact precluded this determination. In its order denying defendant's motion for summary judgment based on qualified immunity as to plaintiffs' claim that defendant fired them because of their political affiliations, the district court found that "[d]ischarge of nonpolicymaking, nonconfidential public employees because of political affiliation violates the First and Fourteenth Amendments to the United States Constitution." J.A. 16. However, the district court concluded that "[s]ummary judgment is not proper in this case because the parties dispute Hadley's awareness of Plaintiffs' political affiliation at the time of Plaintiffs' discharge" and because the parties dispute what the "Plaintiffs' duties [were] at the County Auditor's Office." J.A. 17.

This court has held that a denial of a claim of qualified immunity is immediately appealable. *Cagle v. Gilley*, 957 F.2d 1347, 1348 (6th Cir. 1992) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)).[1] Because application of the doctrine of qualified immunity to a particular defendant is question of law, we review the district court's determination de novo. *Mumford v. Zieba*, 4 F.3d 429, 432 (6th Cir. 1993). It is

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[1] The Supreme Court has recently held in *Johnson v Jones*, 115 S. Ct. 2151 (1995), that a defendant may not immediately appeal a district court's denial of summary judgment based on qualified immunity where the district court finds that a genuine issue of material fact precludes summary judgment *Id.* at 2153. However, *Johnson* is not applicable to this case because, as later discussed, the district court erred in its analysis of whether the law prohibiting discharge of public employees in plaintiffs' positions because of their political affiliation was clearly established at the time of defendant's conduct.

well-established that government officials performing discretionary functions generally are shielded from personal liability for civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Buckner v. Kilgore*, 36 F.3d 536, 539 (6th Cir. 1994). Generally, in determining whether a right is clearly established, a district court must look to precedent from the Supreme Court, the Sixth Circuit, or from itself. *Ohio Civil Serv. Employees Ass'n v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988). Decisions of other courts may also clearly establish the law when such determinations "both point unmistakenly to the unconstitutionality of the conduct and [are] so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct was unconstitutional." *Cagle*, 957 F.2d at 1348. The Supreme Court has also instructed that when analyzing whether a right is clearly established, the court must carefully define the right at issue:

> The operation of this ["clearly established law"] standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or

> statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.

Anderson, 483 U.S. at 639. *Accord Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir.), *cert. denied*, 64 U.S.L.W. 3210 (1995).

In concluding that at the time Hadley discharged plaintiffs, the law was clearly established that nonpolicymaking, nonconfidential public employees could not be fired because of their political affiliation, the district court relied on the Supreme Court's decisions in *Elrod v. Burns*, 427 U.S. 347, 372-73 (1976), and *Branti v. Finkel*, 445 U.S. 507, 518-19 (1980). In *Elrod*, a plurality of the Court concluded that "a nonpolicymaking, nonconfidential government employee can[not] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Elrod*, 427 U.S. at 375. In *Branti*, the Court clarified the test of whether politically motivated personnel decisions violate the First Amendment and stated that "it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered. Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character." *Branti*, 445 U.S. at 518. Thus, the Court abandoned the labels of "policymaker" and

"confidential employee," and held that the relevant issue is "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* Applying this test, the Court in *Branti* concluded that a public defender's continued employment could not be dependent on his allegiance to the dominant political party. *Id.* at 519.

Courts have applied the *Elrod* and *Branti* framework for assessing the constitutionality of patronage dismissals on a case-by-case basis, examining each position individually. *Mumford*, 4 F.3d at 434 (stating that courts have found it impossible to identify generic categories of positions where partisan selection and rejection are permissible). In this regard, this court has analyzed the duties and responsibilities of several positions and held that they did not enjoy the right to be free from patronage dismissal. *See, e.g., Mumford*, 4 F.3d at 435 (chief referee); *Cagle*, 957 F.2d at 1349 (deputy sheriff); *Faughender v. City of North Olmsted*, 927 F.2d 909 (6th Cir. 1991) (secretary to mayor); *Monks v. Marlinga*, 923 F.2d 423 (6th Cir. 1991) (assistant prosecutor); *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990) (city attorney); *Christian v. Belcher*, 888 F.2d 410 (6th Cir. 1989) (county flood plain administrator); and *Balogh v. Charron*, 855 F.2d 356 (6th Cir. 1988) (court bailiff). We have instructed that when analyzing "whether political considerations are appropriate in making personnel decisions *for a certain position*, we must examine the inherent duties of that position and the duties that the new holder of that position will perform." *Faughender*, 927 F.2d at 913 (emphasis added). *Ac-*

cord Williams, 909 F.2d at 155. Thus, "a court must examine the position . . . itself, rather than the position as performed by [the plaintiff]," *Williams*, 909 F.2d at 155, when determining whether political beliefs are an appropriate requirement for the position." *Faughender*, 927 F.2d at 913.

In this case, the district court found that at the time Hadley fired plaintiffs, it was clearly established that nonpolicymaking, nonconfidential employees were protected from being fired because of political affiliation under the First and Fourteenth Amendments. However, the district court also found that material issues of fact regarding plaintiffs' job duties at the County Auditor's Office precluded summary judgment. Thus, the district court erred in its analysis of whether the law prohibiting patronage dismissals was clearly established at the time Hadley dismissed plaintiffs by failing to consider whether it was clearly established that employees *in the particular positions at issue in this case*, in light of the responsibilities inherent in those positions, were protected from patronage dismissal. *See Mendez-Palou v. Rohena-Betancourt*, 813 F.2d 1255, 1259 (1st Cir. 1987) (holding that it is not sufficient to state generally that *Elrod* and *Branti* clearly establish that the First Amendment protects government employees from discharges based on political affiliations).

This determination is not precluded by the parties' dispute regarding plaintiffs' previous job duties at the County Auditor's Office under Auditor Bell. In *Faughender*, we explained that when determining whether political considerations are appropriate in making personnel decisions for a certain position, a district court should not look to the duties previ-

ously performed by the plaintiff. Instead the court must examine the inherent duties of that position, and the duties that the new hiring authority, *i.e.*, Hadley, reasonably envisions that the holder of that position will perform. *Faughender*, 927 F.2d at 913. In this case, the record does not contain any evidence of what duties Hadley envisioned that the holders of plaintiffs' positions would perform. We hold that the district court erred by failing to consider the duties inherent in plaintiffs' particular positions and Hadley's plans for the employees holding such positions in determining whether the law was clearly established that plaintiffs' positions were protected from patronage dismissal at the time that Hadley discharged plaintiffs, and we shall remand these questions to the district court for further consideration.

III.

For the reasons stated, the order of the district court denying defendant's motion for summary judgment based on qualified immunity is REVERSED, and the case is REMANDED to the district court in order that it may determine whether it was clearly established at the time defendant Hadley fired plaintiffs that public employees in plaintiffs' positions could not be fired because of their political affiliations. We, however, do not suggest or imply what the eventual outcome of this issue should be.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JUDY BAKER, et al.,	)	JUDGE LESLEY
	)	BROOKS WELLS
Plaintiffs-Appellees,	)	
	)	CASE NO. 4: 92 CV 495
- vs -	)	
	)	ORDER
PAT HADLEY,	)	
	)	
Defendant.	)	

BACKGROUND

Plaintiffs, Judy Baker ("Baker"), Myra Allison ("Allison"), and Bonnie Johnson ("Johnson") filed a three-count complaint against Defendant, Patricia Hadley ("Hadley") in March, 1992. Plaintiffs allege in March, 1991, Hadley, a Republican, replaced an incumbent Democrat, Kent Bell ("Bell"), as Columbiana County Auditor. Plaintiffs worked in the County Auditor's Office since the 1970's and campaigned for Hadley's opponent in the prior election. Plaintiffs were terminated without notice on March 11 when Hadley assumed office.

Plaintiffs claim civil rights violations pursuant to 42 U.S.C. §§ 1983, 1985, and 1988 and wrongful discharge under Ohio law. In Count 1, Plaintiffs suggest they were discharged in violation of their First and Fourteenth Amendment rights of speech and political association with regard to their activities on Bell's campaign. In Count 2, Plaintiffs argue they were discharged in violation of their First and Fourteenth Amendment rights with regard to attempts to unionize the County

Auditor's office. Plaintiffs contend this claim is a First Amendment claim rather than any claim under federal or state labor relations law. Plaintiffs allege their state-law wrongful discharge claim in Count 3.

The case was originally assigned to District Judge Alvin I. Krenzler. Following Judge Krenzler's retirement, the case was supervised by Chief Judge Thomas D. Lambros. On February 17, 1994, the case was reassigned to this Court (Docket No. 25).

Pending before the Court are Defendant's motion for summary judgment (Docket No. 28) and Plaintiffs' motion for partial summary judgment (Docket No. 36). The Court has reviewed the memoranda, affidavits, and certificates submitted by the parties and oral arguments of counsel during the December 2, 1994 hearing. For the following reasons, Defendants' motion for summary judgment is denied on Counts 1 and 3 and granted on Count 2. Plaintiffs' motion, which addressed the limited issue of qualified immunity, is denied in full.

SUMMARY JUDGMENT STANDARD

Summary judgement is proper when, "pleading, depositions, answers to interrogatories . . . . together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law." F. R. Civ. P. 56(c). After adequate time for discovery, summary judgment should be granted against a party bearing the burden of proof if they fail to

make a sufficient showing on an essential element of their case. *Celotex Corp. V. Catrett*, 477 U.S. 317, 322-23 (1986) ("There can be 'no issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial"). The standard for summary judgment mirrors the standard for a directed verdict under F. R. Civ. P. 50(a). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Summary judgment should be granted if under governing law, there can be but one reasonable conclusion as to the verdict. *Id.*

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COUNT 1

Material issues of fact dictate that Hadley's motion for summary judgment on Plaintiffs' civil rights claims of retaliatory political discharge be denied. Discharge of nonpolicymaking, nonconfidential public employees because of political affiliation violates the First and Fourteenth Amendments to the United States Constitution. *Elrod v. Burns*, 427 U.S. 347, 372-73 (1976) (political discharge of employees of Sheriff's office violated the First and Fourteenth Amendments); *Branti v. Finkel*, 445 U.S. 507, 518-19 (1980) (political discharge of public defenders violated First and Fourteenth Amendments); *Christian v. Belcher*, 888 F.2d 410 (6th Cir. 1989) (district court grant of summary judgment for defendant who discharged a County Flood Administrator for political reasons reversed).

Summary judgment is not proper in this case because the parties dispute Hadley's awareness of Plaintiffs' political affiliation at the time of Plaintiffs' discharge. Contending assertions of Plaintiffs' duties at the County Auditor's Office also require resolution by a fact-finder.

Hadley's argument that Plaintiffs' civil rights claims are precluded lacks merit. The findings of an Administrative Law Judge ("ALJ") for the Ohio State Board of Personnel Review ("SBPR") are not binding on this Court. The legal definition of "classified" versus "unclassified" employment is not determinative of the First Amendment standard of "policymaking" and "confidential" under *Branti* and *Elrod*. The ALJ did not consider Plaintiffs' civil rights claims on the merits. For these reasons, Plaintiffs' claims are entitled to full consideration before this Court.

COUNT 2

In Count 2, Plaintiffs' raise a civil rights claim regarding their attempts to unionize the County Auditor's Office. Hadley argues this claim is barred by the Ohio limitations period for unfair labor practice claims. However, the Ohio limitations period is not relevant to this claim. Plaintiffs' claim derives from the Constitution and federal civil rights statutes, rather than state labor relations law.

Hadley's motion should be granted on Count 2 because Plaintiffs' have not set forth a prima facie case of retaliatory discharge for constitutionally protected activity. In *Monks v.*

Marlinga, 923 F.2d 423 (6th Cir. 1991), the Court held evidence of a defendant's knowledge of a plaintiff's union activity is required for a First and Fourteenth Amendment claim of retaliatory discharge. Plaintiffs do not provide any evidence demonstrating Hadley was aware that Plaintiffs' were involved in a union organization drive. Under *Monks*, the claims in Count 2 cannot succeed as a matter of law.

COUNT 3

Plaintiffs allege a state-law claim of wrongful discharge in Count 3. Hadley argues summary judgment is proper because Plaintiffs have no action for wrongful discharge under Ohio law.

Ohio recognizes a public policy exception to the general rule of at-will employment. *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St. 3d 228 (1990). A claim of wrongful discharge may be maintained when employees are discharged in contravention of a clear public policy, derived from state or federal constitutional law. *Painter v. Graley*, 70 Ohio St. 3d 377 (1994). If proven, the facts alleged by the Plaintiffs suggesting they were discharged in retaliation for exercising their constitutional rights, could comprise a wrongful discharge claim under Ohio law.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs' motion for summary judgment addresses Hadley's qualified immunity defense. Hadley contends qualified immunity shields her from personal liability in this case.

If the law is clearly established, a defense of qualified immunity should fail because a reasonably competent public official should know the law governing her conduct. *Harlow v. Fitzgerald*, 457 U.S. 807, 818 (1982). Depending on results of fact-finding regarding Plaintiffs' roles at the County Auditor's Office prior to their discharge, qualified immunity may or may not apply.[1] Material issues of fact between the parties prevent summary disposition of qualified immunity issues before the Court.

CONCLUSION

Defendant's motion for summary judgment is granted in part and denied in part. Plaintiffs' motion is denied. The parties may proceed to trial on claims contained in Counts 1 and 3 of Plaintiffs' complaint.

All parties and counsel of record shall attend a Status Conference with the Court on January 17, 1995 at 3:30 p.m.

IT IS SO ORDERED.

/S/ Lesley Brooks Wells
UNITED STATES DISTRICT JUDGE

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[1] Summary judgment on qualified immunity is especially inappropriate given the potential impact of Baker and Johnson's resignation of supervisory authority in December, 1990.

No. 95-1483
Allison v. Hadley

No. 95-1486
Baker v. Hadley

OHIO SUPREME COURT, JANUARY TERM, 1995

Wednesday, October 18, 1995
DISCRETIONARY APPEALS NOT ALLOWED

95-1483. Allison v. Hadley. *Franklin County*, No. 94APE10-1551.
RESNICK and F.E. SWEENEY, J.J. dissent.

95-1486. Baker v. Hadley. *Franklin County*, Nos. 94APE10-1550 and 94APE10-1552.
DOUGLAS and WRIGHT, J.J., dissent.

Wednesday, November 22, 1995
RECONSIDERATION DOCKET

95-1483. Allison v. Hadley. *Franklin County*, No. 94APE10-1551. Reported at 74 Ohio St.3d 1422, 655 N.E.2d 742. On motion for reconsideration. Motion denied.
DOUGLAS and RESNICK, J.J. dissent.

95-1486. Baker v. Hadley. *Franklin County*, Nos. 94APE10-1550 and 94APE10-1552. Reported at 74 Ohio St.3d 1422, 655 N.E.2d 742. On motion for reconsideration. Motion denied.
DOUGLAS and PFEIFER, J.J., dissent.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Judy Baker, Appellant-Appellant,	)	
v.	)	No. 94APE10-1550
Patricia Hadley, Columbiana County Auditor and State Personnel Board of Review, Appellees-Appellees.	)	(REGULAR CALENDAR)
Myra Allison, Appellant-Appellant,	)	
v.	)	No. 94APE10-1551
Patricia Hadley, Columbiana County Auditor and State Personnel Board of Review, Appellees-Appellees.	)	(REGULAR CALENDAR)
Bonnie Johnson, Appellant-Appellant,	)	
v.	)	No. 94APE10-1552
Patricia Hadley, Columbiana County Auditor and State Personnel Board of Review, Appellees-Appellees.	)	(REGULAR CALENDAR)

OPINION

Rendered on June 6, 1995

Stewart R. Jaffy & Associates Co., L.P.A., Stewart R. Jaffy and Marc J. Jaffy, for appellants.

John K. Alberty, for appellee Columbiana County Auditor.

Betty D. Montgomery, Attorney General, and *Barbara A. Serve*, for appellee State Personnel Board of Review.

APPEALS from the Franklin County Court of Common Pleas.

LAZARUS, J.

Appellants Judy Baker, Myra Allison, and Bonnie Johnson, appeal from a judgment of the Franklin County Court of Common Pleas affirming a State Personnel Board of Review ("SPBR") determination that appellants were members of the unclassified civil service pursuant to R.C. 124.11(A)(4) and (9). Appellants assert seven assignments of error, as follows:

> 1. "The Court of Common Pleas erred in finding that the decision of the State Personnel Board of Review was based upon reliable, probative and substantial evidence, and in accordance with law."

2. "The Court of Common Pleas erred in failing to find that the three discharged employees were classified employees because they did not fall within the exceptions created by § 124.11(A)(4) and § 124.11(A)(9) and as classified employees are entitled to the protection afforded all civil service employees limiting discharge to situations of just cause as provided in R.C. Chapter 124."

3. "The Court of Common Pleas erred in ordering the Appellants' appeal from the State Personnel Board of Review dismissed and in failing to find that the State Personnel Board of Review erred in dismissing Appellants' appeal for lack of jurisdiction."

4. "The Court of Common Pleas erred in failing to find the ALJ erred in concluding that Appellants were deputy county auditors."

5. "The Court of Common Pleas erred in failing to find that the ALJ erred in concluding that Appellants held a fiduciary relationship to the county auditor and therefore were deputies."

6. "The Court of Common Pleas erred in failing to find that the Findings of Fact set out by the ALJ contain legal conclusions and characterizations which do not comport with the evidence."

7. "The Court of Common Pleas erred in failing to find that the Findings of Fact set out by the ALJ

contain facts not submitted as evidence in the record and therefore is unsupported."

In November of 1990, incumbent Columbiana County Auditor, Kent Bell, was defeated by appellee Patricia Hadley in the general election. The appellants are three long-term employees of the auditor's office: Myra Allison, hired in December of 1977; Judy Baker, hired in June of 1978; and Bonnie Johnson hired in January of 1971. In early 1990, then-auditor Bell named Bonnie Johnson chief deputy auditor and Judy Baker office manager. They received pay increases with their new titles, but their actual job duties remained the same. Shortly after Mr. Bell's defeat, Judy Baker and Bonnie Johnson resigned their positions as "office manager" and "chief deputy auditor," respectively, to become eligible to join a collective bargaining unit. Neither their pay nor their job duties changed as a result of their resignations.

Early on March 11, 1991, her first day as Columbiana County Auditor, appellee Hadley distributed a form to her employees, instructing them to describe their work. Appellants each filled out a form for the new auditor. Later that morning, appellee met with appellants and discharged them. Appellants appealed their terminations on the basis that they were classified employees.

An administrative law judge ("ALJ") conducted a hearing pertaining to appellants' job duties to determine whether appellants fell within the classified or unclassified civil service. The ALJ found that appellants were in the unclassified service due to the nature of their job duties. The ALJ deter-

mined that appellants were fiduciaries under R.C. 124.11(A)(9) and, also, that they were "deputy county auditors" under R.C. 124.11(A)(4). The ALJ concluded that appellants were, therefore, unclassified employees under either or both statutory schemes. The SPBR unanimously adopted the ALJ's findings.

Appellants filed an appeal to the Court of Common Pleas for Franklin County, Ohio. That court read the entire transcript of the proceedings and completely reviewed the briefs of the parties and the report and recommendation of the ALJ. The court found that the SPBR's dismissal of the appeals was supported by reliable, probative, and substantial evidence and was in accordance with law. Therefore, the court affirmed the decision of the SPBR.

The seven assignments of error may be combined into two general issues on appeal. First, we must resolve whether the duties performed by appellants at the time of their termination placed them within a fiduciary relationship to the auditor pursuant to R.C. 124.11(A)(9). Second, we must determine whether the appellants were deputy county auditors within the meaning of R.C. 124.11(A)(4). If either of the grounds is supported by reliable, probative, and substantial evidence, and is in accordance with law, then the trial court's decision must be upheld. *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 572. *Kelly v. Accountancy Bd. of Ohio* (1993), 88 Ohio App.3d 453, 461.

R.C. 124.11 divides the civil service into classified and unclassified service. R.C. 124.11(A) exempts certain positions from classified service. The statute provides, in pertinent part:

> "(A) The unclassified service shall comprise the following positions * * *:
>
> " * * *
>
> "(4) The members of county or district licensing boards or commissions and boards of revision, and deputy county auditors;
>
> " * * *
>
> "(9) The deputies and assistants of elective or principal executive officers authorized to act for and in the place of their principals, or holding a fiduciary relation to such principles and those persons employed by and directly responsible to elected county officials and holding a fiduciary or administrative relationship to such elected county officials, and the employees of such county officials whose fitness would be impracticable to determine by competitive examination * * *."

In determining whether a person is in an administrative or fiduciary position, the actual job duties, both assigned and performed, must be evaluated. *In re Termination of Employment* (1974), 40 Ohio St.2d 107. Thus, some discussion of each of appellants' job duties is necessary.

Appellant Myra Allison was the most experienced person in the bookkeeping department. She was responsible for approving and issuing requisitions for all county offices. She approved purchase orders with a self-imposed limit of $100,000. She handled transfers of funds, entered data into a computer, balanced funds, prepared reports, signed the auditor's name, and put her initials next to his name on various documents. Although described by others as the "head bookkeeper," there was no evidence that she supervised or arranged the work of others.

In *Rarick v. Geauga County Bd. of County Commrs.* (1980), 63 Ohio St.2d 34, Mr. and Mrs. Rarick were the Building Service Superintendent and Assistant Building Service Superintendent, respectively, for Geauga County. The Ohio Supreme Court enumerated six duties which were assigned or performed by the Raricks and eliminated four of the six as not being fiduciary or administrative. The court stated, at 38:

> "However, the positions which the Raricks occupied involved two duties, assigned and performed, which did place them in the unclassified service. These are the duty to purchase supplies through blanket purchase orders and the duty to supervise and arrange for the work of the building staff."

In discussing the authorization of the Raricks to sign purchase orders, limited to $300 per request, the court stated that "[t]rust in the Raricks' honesty and judgment was required." *Id.* at 39.

In the present case, the ALJ found that Myra Allison possessed unlimited authority to approve purchase orders for the county. She had imposed her own limit of $100,000, above which she would go to the auditor for approval. In determining whether a fiduciary relationship exists between a public official and an employee, the Ohio Supreme Court has indicated that emphasis should be placed upon whether the assigned job duties require, as essential qualifications over and above technical competency requirements, a high degree of trust, confidence, reliance, integrity and fidelity. *State ex rel. Charlton v. Corrigan* (1988), 36 Ohio St.3d 68, at syllabus. However, the mere act of handling money belonging to others does not, by itself, necessarily indicate the existence of a fiduciary relationship. *Yarosh v. Becane* (1980), 63 Ohio St.2d 5, 12.

Based on the analysis in *Rarick, supra*, it appears that the auditor placed a high degree of trust in appellant Allison when he gave her unlimited purchase order approval authority. Certainly, the potential for abuse exists when an employee is entrusted with such authority. Therefore, it is crucial for the employer to have a high degree of trust in the integrity of the employee. The record contains reliable, probative, and substantial evidence as to appellant Allison's purchase order authority; therefore, it was not an abuse of discretion for the trial court to affirm the SPBR with respect to appellant Allison.

Appellant Judy Baker issued dog, trailer, and vendor licenses. Along with the auditor, she possessed lockbox authorization. Appellant Baker's lockbox duties consisted of

opening decedents' lockboxes in the presence of others and preparing an inventory of the contents. She also processed various estate tax forms.

In *Boring v. Vinton County Auditor* (1979), 79-REM-04-0695, the SPBR determined that an auditor's employee possessed the authority and did sign the auditor's name to warrants, dog tag applications, and vendor's licenses. However, there was no evidence that the auditor placed any special trust in the employee distinct from the trust he placed in all of his permanent employees. Similarly, in *Burns v. Columbiana County Auditor* (1984), 84-REM-01-0076, the evidence showed the auditor's employee to be a record keeper, a compiler of figures, a maker of notations, and a document keeper. The employee also signed the auditor's name on various documents. The SPBR determined that these duties were not indicative of a fiduciary relationship.

In this case, the ALJ found that, in performing these functions, "Appellant Baker occupied a position of special trust, confidence, and fidelity with the Auditor." Report and Recommendation, at 16. In reviewing the record, we cannot find evidence that these duties, as performed by appellant Baker, are anything more than routine mechanical work of a clerical nature. Being authorized to issue dog, trailer, and vendor's licenses is not evidence that the auditor reposed any special trust in appellant Baker, as distinct from the trust he reposed in all of his employees. Further, the auditor testified that appellants did not act in his place or have a special relationship of trust with him. Thus, it was error for the ALJ to

find that appellant Baker occupied a fiduciary relationship with the auditor and an abuse of discretion for the trial court to uphold the SPBR's order.

Appellant Bonnie Johnson had worked for the auditor's office for twenty-one years and had worked in all the departments except bookkeeping. At the time she was terminated, her job was to make settlements and distribute tax revenues to various subdivisions after receiving figures from the treasurer's office. She also assisted in the calculation of tax rates and prepared abstracts of value. Because of her office-wide knowledge of procedures, she answered questions of other employees, but did not hire, fire, discipline, or supervise others.

The ALJ indicated that appellant Johnson had access to personal and business tax records and could make a preliminary review of the county's delinquent taxpayer list. The ALJ found that appellant Johnson had access to confidential documentation, and served as the auditor's chief deputy. Because of the confidence, trust, and discretion inherent in such a working relationship, the ALJ found that appellant Johnson held a fiduciary relationship with the Auditor.

In *State ex rel. Charlton v. Corrigan* (1988), 36 Ohio St.3d 68, the Ohio Supreme Court determined that certain employees within the Cuyahoga County Treasurer's office were fiduciaries because they investigated delinquent taxpayers, had access to a variety of confidential and sensitive information, and possessed considerable discretion to establish repayment plans on a case-by-case basis. We find this factual scenario to be distinguishable from appellant Johnson's duties.

Although, at one point in time, appellant Johnson had the title Chief Deputy Auditor, a review of the record reveals that she did not run the office in the auditor's absence. While she attended one budget committee meeting when the auditor was absent, she did not have authority to vote, make decisions, or act on his behalf. Both she and the auditor testified that she never signed his name to a settlement. Rather, she would prepare documents and present them to the auditor for his review and signature. In addition, the evidence did not establish that appellant Johnson had access to confidential information. Rather, she provided the delinquent taxpayer list to the public by sending a copy to the newspaper. These duties are not representative of the kind of individualized discretion or degree of trust necessary for a fiduciary relationship.

Having determined that appellants Baker and Johnson were not fiduciaries within the meaning of R.C. 124.11(A)(9), we must turn our attention to the question of whether appellants were deputy county auditors under R.C. 124.11(A)(4).

The ALJ determined that the Ohio Supreme Court's decision in *State ex rel. Emmons v. Guckenberger* (1936), 131 Ohio St. 466, has been eroded by amendments to R.C. 124.11. In *Emmons*, the court held that an employee would not be considered a deputy county auditor and consequently placed in the unclassified service unless (1) he is authorized by law to act for and in the place of his principal, and (2) he holds a fiduciary relationship to such principal. *Id.* at 469. Both of the qualifications must be present. *Id.* Additionally, the Ohio

Administrative Code has provided guidance as to the meaning of "deputy." Ohio Adm.Code 123:1-47-01(29) defines deputy, as follows:

> "'Deputy' -- means an employee authorized by law to act generally for or in the place of his principal and holding a fiduciary relationship to such principal."

The ALJ examined the legislative history of R.C. 124.11(A)(4) and (9). He reasoned that amendments to the statute have rendered it unnecessary to require that an employee serve in a fiduciary or administrative relationship in order to be a "deputy county auditor" given that county auditors hold the positions of guardians of the public fisc. Thus, the ALJ concluded that one only had to be in an agency relationship to be a deputy under today's version of R.C. 124.11(A)(4). The ALJ further found that "[e]ach of Appellants acted as the Auditor's agent in assisting him in carrying out important statutory duties of his Office." (Report and Recommendation at 23.)

We decline to adopt the ALJ's interpretation of R.C. 124.11(A)(4), as we believe *Emmons* is still good law and has not been legislatively overruled. In *Summit County Auditor v. Williams* (Nov. 30, 1988), Summit App. No. C.A. 13580, unreported, the Ninth District Court of Appeals held that an auditor's employee was not a deputy auditor as he had little decision-making authority, was far down in the organization, and performed duties such as tax assessment evaluations using pre-set formulas. Thus, his job consisted of perfunctory, mechanical tasks.

In a similar manner, the job duties actually performed by appellants do not establish that they acted for or in the place of the auditor. The record did not demonstrate that any of the appellants had the authority to speak for, act for, or make decisions for the auditor. Appellants did not have policy-making authority. Appellants had not signed oaths as deputy county auditors. And, finally, no certification was filed with the county treasurer's office listing appellants as deputy county auditors as required by R.C. 319.05.[1] Because none of the appellants were appointed or removed as deputies, as required by R.C. 319.05, they were not deputy auditors, and it was improper for the ALJ to apply this exception.

Based on all the foregoing, we find that the trial court abused its discretion in finding that appellants were "deputy auditors" and, therefore, unclassified within the meaning of R.C. 124.11(A)(4), as that decision by SPBR was not based upon reliable, probative, and substantial evidence and was not in accordance with law. We also find that the determination that appellants Baker and Johnson were fiduciaries within the meaning of R.C. 124.11(A)(9) was not supported by reli-

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[1] R.C. § 319.05 provides:

> "The county auditor may appoint one or more deputies to aid him in the performance of his duties. The auditor and his sureties shall be liable for the acts and conduct of such deputies. When an auditor appoints or removes a deputy, such auditor shall make a record of such appointment or removal in his office and file a certificate of appointment or removal with the county treasurer, who shall record and preserve it."

able, probative, and substantial evidence. We do, however, find that the SPBR's order and the decision of the common pleas court that appellant Allison was a fiduciary to be supported by reliable, probative, and substantial evidence and in accordance with law.

Accordingly, appellants' assignments of error are sustained with respect to appellants Baker and Johnson, and the judgment of the Franklin County Court of Common Pleas is reversed with respect to these two appellants. Appellants' fourth assignment of error is sustained with respect to appellant Allison. The remaining assignments of error are overruled with respect to appellant Allison, and the judgment of the Franklin County Court of Common Pleas is affirmed with respect to appellant Allison.

Judgment affirmed in part, reversed in part, and cause remanded.

PETREE and TYACK, JJ., concur.

Supreme Court, U.S.
FILED
JUL 9 1999
OFFICE OF THE CLERK

No. 98-1813

IN THE

Supreme Court of the United States

JUDY BAKER; MYRA ALLISON; BONNIE JOHNSON,

Petitioners,

v.

PATRICIA HADLEY,
COLUMBIANA COUNTY AUDITOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Patricia Hadley, is insured by a publicly owned corporation, American International Group, Inc. A second insurer, Nationwide Mutual Insurance Company, is a majority stock owner in a publicly owned corporation, Nationwide Financial Services, Inc. Both insurers may have a financial interest in the outcome of this litigation.

TABLE OF CONTENTS

Page

Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iii

Statement of the Case 1

A. Introduction 1

B. The Underlying Facts 1

Reasons for Denying the Writ 5

Conclusion 9

TABLE OF CITED AUTHORITIES

	Page
Cases:	
Curtis v. State ex rel Morgan, 108 Ohio St. 292, 140 N.E. 522 (1923)	6
Elrod v. Burns, 427 U.S. 347 (1976)	5, 7
Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990)	6
United States Constitution:	
First Amendment	5
Statute:	
Ohio Rev. Code § 124, *et seq.*	6

STATEMENT OF THE CASE

A. Introduction

This controversy arose out of a claimed "political firing" of the three Petitioners by the Respondent elected official, Patricia Hadley, Columbiana County, Ohio, Auditor. Ms. Hadley's position throughout the protracted litigation is that she desired to have loyal employees occupying the upper management positions of her office. There was not a wholesale firing in the office. The vast majority of her predecessor's office staff was left intact.

In affirming a final summary judgment, the Sixth Circuit Court of Appeals ruled that newly-elected officials may reorganize their departments. This is permissible even if a routine or ministerial job is transformed into a confidential or policymaking position. (App. A 15, 16).

B. The Underlying Facts

In November, 1990, longtime Democratic incumbent Columbiana County Auditor, Kent Bell, was defeated by Republican Opponent, Patricia Hadley, now Columbiana County Auditor, in the general election. Shortly after Bell's defeat, certain employees of the Auditor's office sought Union representation in order to protect their jobs. [R.30: Deposition of J. Baker at pp. 26-27].

The description in the Petition of the Petitioner's job titles omits several pertinent facts. Two employees, Judy Baker and Bonnie Johnson (Petitioners in the present case), resigned their positions as "Office Manager" and "Chief Deputy Auditor", respectively, on the same date, December

17, 1990. Their resignations were effected so that these employees could become eligible to join the then forming bargaining unit. [R.29: Administrative transcript of Personnel Board of Review at p. 83 ("A.T. at 83")]. Neither of these employees suffered a commensurate reduction in pay nor were their job duties or responsibilities altered in the slightest way after their resignations. *Id.*

On March 11, 1991, Ms. Hadley took office. On her first day, she had all employees of the Auditor's office complete "desk audits" which were detailed descriptions of their job duties, responsibilities and related information. [R.28: Exhibits 3,4, and 5 attached to Respondent's Motion for Summary Judgment].

Later that same day, March 11, 1991, Ms. Hadley met with Petitioners and informed them that they had been dismissed. The only evidence before the trial court was that Respondent Hadley dismissed Petitioners solely because she wanted to replace the upper management positions with people that would be loyal to her, that would share the same philosophies and belief on how the Auditor's office should be run, and would correct problems in the Auditor's office that Ms. Hadley attributed Petitioners as part of being. [R.32: Deposition of Hadley at pp. 56-68]. Petitioners' terminations had nothing to do with their political beliefs, and indeed, Respondent Hadley did not even know Petitioners' political affiliation. [R.32: Deposition of Hadley at pp. 12-14].

Petitioner Myra Allison was employed as "Budgetary Financial Specialist" [R.32: Deposition of Hadley, Exhibit 1]; Myra Allison was described by others as the "Head Bookkeeper". She was responsible for approving and

issuing requisitions for all county offices. She approved purchase orders with a self-imposed limit of $100,000. [R.29: A.T. at pp. 24, 128 and 129].

In her deposition, Ms. Hadley was not questioned by Petitioners about the reorganization of her office, despite their claims to the contrary. In support of her Motion for Summary Judgment, evidence was supplied by affidavits of Ms. Hadley and her two top administrators, John Goempel and Nancy Milliken. In her plan of reorganization, Ms. Hadley was able to reduce the top three administrative positions which were held by the Plaintiffs to two positions. Judy Baker had been "Office Manager". That position was eliminated in its entirety. Also, on April 1, 1991, Ms. Hadley hired John Goempel as "Chief Deputy Auditor". That position had been held by Petitioner Bonnie Johnson. In order to enhance the efficiency of the office, Ms. Hadley directed that twelve of the sixteen employees report directly to Chief Deputy Auditor, John Goempel. The four remaining employees, who are located on a different level of the Courthouse, were to report to Nancy Milliken.

In the chain of command, Nancy Milliken and John Goempel both report to Ms. Hadley. It is their job to filter out the information that is important to Ms. Hadley and relay it to her, as she is unable to be in all places at all times. In order for this to be done effectively, Ms. Hadley must be able to trust the top two employees who report to her. If an employee has a question or concern, he or she should report that directly to their supervisor, either Nancy Milliken or John Goempel, for resolution. If Ms. Hadley's personal attention is necessary, either Ms. Milliken or Mr. Goempel will discuss the matter with Ms. Hadley.

Also, because Ms. Hadley did not need a personal secretary, the two people she relies upon to screen calls, correspondence and to decide what information is released to the employees and public, are John Goempel and Nancy Milliken. Both John Goempel and Nancy Milliken are directed to treat the public professionally and fairly because it is the voters who deal with the Auditor's Office. On a regular basis, John Goempel and Nancy Milliken both deal with other elected officials and agency officials throughout the county. It was Ms. Hadley's intent to have persons who could speak accurately and professionally on behalf of the County Auditor. [R.63: Affidavits of Hadley, Milliken and Goempel, Exhibits attached to Defendant's Second Motion for Summary Judgment, j.a. at p. 518].

Ms. Hadley needed someone she could trust and who could serve as a close confidant to her on pending matters. She felt it was necessary to have a top management team of her personal selection in order that she could rely on them to communicate her policy and to implement her ideas. That was the reason she hired John Goempel and Nancy Milliken. She wanted to improve the perception of the County Auditor's Office, both within the County and throughout the State. She felt she could not do that unless she had a strong management team.

John Goempel and Nancy Milliken both fulfill a number of job duties in their positions as Head Bookkeeper/ Administrative Assistant and Chief Deputy Auditor. Those job duties were set out in lengthy affidavits attached in support of Ms. Hadley's Motion for Summary Judgment.

REASONS FOR DENYING THE WRIT

This Court has previously decided the issue before it and it should not be reviewed again. The Sixth Circuit Court of Appeals ruled the District Court properly granted Summary Judgment in favor of the Defendant and that decision should be affirmed. Not all governmental employees are entitled to First Amendment protection. The Respondent did not dismiss the Petitioners because of their political beliefs. There is no evidence to support that politics had any influence over Patricia Hadley's restructuring decision and thus Petitioners fail to even escape the first hurdle of a patronage dismissal case. Even if, for the sake of argument, politics was found to be the *sole* motivation in the dismissals, the Petitioners held inherently political positions and the positions were inherently political as envisioned by Patricia Hadley.

As this Court has previously held, "there is a vital need for government efficiency and effectiveness." *Elrod v. Burns*, 427 U.S. 347, 372 (1976). Auditor Hadley was able to reduce the Petitioners' three positions into two, thus making the Auditor's office more efficient. There was a need to improve the reputation of the office. Ms. Hadley's two key employees improved the effectiveness of the office by being responsible for supervising employees, handling citizen concerns, communicating with other office holders and disseminating information to the public. This Court has recognized the importance of an official's discretion in hiring loyal persons as top administrators:

> A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing

> certain high-level employees on the basis of their political views.

Rutan v. Republican Party of Illinois, 497 U.S. 62, 74 (1990).

Ms. Hadley did this so that the public mandate would be followed. As this Court noted, there is "a need to insure that policies which the electorate has sanctioned are effectively implemented." *Elrod*, *supra*, at 372.

The only way for an elected official to be efficient and effective is to trim staff and place top management that can help with the goals, can design and implement policy and can be trusted with confidential communications.

The Petitioners claim that the courts below have left public employees with little or no protection is simply not true.[1] First of all, there was not a wholesale housecleaning

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1. In Ohio, as in many other states, public employees are protected by civil service enactments. *See* Ohio Rev. Code § 124, *et seq*. The Ohio Supreme Court noted in Paragraph 4 of its syllabus in the case of *Curtis v. State ex rel Morgan*, 108 Ohio St. 292, 140 N.E. 522 (1923):

> The fundamental purpose of civil service laws and rules is to establish a merit system, whereby selections for appointments in certain branches of the public service may be made upon the basis of demonstrated relative fitness, without regard to political considerations, and to safeguard appointees against unjust charges of misconduct and inefficiency, and from being unjustly discriminated against for religious or political reasons or affiliations. Those laws and rules may not be invoked by

(Cont'd)

when Ms. Hadley took office. The vast majority of the office staff kept their jobs. The Petitioners, who were terminated, held the positions of Office Manager, Chief Deputy Auditor and Head Bookkeeper. The positions were important. In fact, the Sixth Circuit Court stated these (titles) suggest "the potential for considerable authority within the office." (App. A 14).

In answer to Petitioners' question (Pet. 11), "yes," it is reasonable for an elected official to envision job positions. How else can the efficiency, effectiveness and reputation of the public office be enhanced? "There is a need to insure that policies which the electorate has sanctioned are effectively implemented." *Elrod*, *supra*, at 372.

Petitioners advance an argument that any public employee can be terminated for any reason if the public employer "envisions" a job that required politics. (Pet. 11). This is a false concern. If this Court were to adopt the Petitioners' proposed standard, no elected official in the land could improve the function of her office. A public employee could simply state she only performed routine or menial work and be employed indefinitely. The newly elected official would be left with the predecessor's

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(Cont'd)

> an appointee, where no discrimination is claimed and no charges have been made involving misconduct, inefficiency, or other delinquency.

Thus, contrary to Petitioners' claims, public employees do enjoy protection in Ohio. In fact, all three Petitioners did take advantage of the Civil Service Statutes. Petitioner Myra Allison's claim had been completely adjudicated adversely to her. Petitioners Judy Baker and Bonnie Johnson's claims are still pending administratively.

problems. There is the risk that her efforts would be sabotaged by her own predecessor-entrenched upper management. Petitioners' proposed standard would extend an open invitation to a patronage employee of a defeated officeholder to collude with the officeholder, after his defeat but prior to installment of the newly elected official, to downgrade her job title and responsibilities.

This case presents itself with the wrong facts for the Petitioners to make that argument. No one has ever argued that the two people who replaced the Petitioners have not done exactly what the Respondent envisioned them doing. No one has ever argued the functions of the Columbiana County Auditor's office has not improved under Patricia Hadley. In short, Patricia Hadley has done exactly what she was elected to do. This litigation should be terminated once and for all.

CONCLUSION

Therefore, for the reasons stated, Respondent, Patricia Hadley, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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